UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PENNSYLVANIA INTERSCHOLASTIC ATHLETIC ASSOCIATION, INC. Petitioner,	)	
v.	)	18-1037
NATIONAL LABOR RELATIONS BOARD, Respondent.	)	

PETITION FOR REVIEW

Petitioner Pennsylvania Interscholastic Athletic Association, Inc. (PIAA) hereby petitions the Court to review and modify or set aside the Decision and Order of the National Labor Relations Board issued against Petitioner on January 26, 2018, in NLRB Case Nos. 06-CA-175817 and 06-RC-152861. A copy of the Decision and Order reported at 366 NLRB No. 10 (Jan. 26, 2018), incorporating by reference the Decision and Order reported at 365 NLRB No. 107 (2017), is attached, along with a Corporate Disclosure Statement.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PENNSYLVANIA INTERSCHOLASTIC ATHLETIC ASSOCIATION, INC.

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

18-1037

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Petitioner Pennsylvania Interscholastic Athletic Association, Inc. (PIAA) is a non-profit corporation conducted exclusively for charitable and educational purposes relating to interscholastic athletic competition, subject to the requirements of the Pennsylvania Interscholastic Athletics Accountability Act, 24 P.S. Education 16-1601-1605. Petitioner has no parent company, public or otherwise, and no shareholders of any kind.

Respectfully submitted,

/s/Maurice Baskin

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Pennsylvania Interscholastic Athletic Association, Inc. *and* Office and Professional Employees International Union, AFL–CIO. Case 06–CA–175817

January 26, 2018

DECISION AND ORDER

BY CHAIRMAN KAPLAN AND MEMBERS PEARCE AND MCFERRAN

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on May 9, 2016, and an amended charge filed on August 25, 2017, by Office and Professional Employees International Union, AFL–CIO (the Union), the General Counsel issued the complaint on August 29, 2017, alleging that Pennsylvania Interscholastic Athletic Association, Inc. (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to recognize and bargain with it following the Union's certification in Case 06–RC–152861.[1] (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(d). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On September 18, 2017, the General Counsel filed a Motion for Summary Judgment. On September 20, 2017, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the Union's certification of representative on the basis of its contentions, raised and rejected in the underlying representation proceeding, that the lacrosse officials in the bargaining unit are independent contractors rather than "employees" under Section 2(3) of the Act, that the Respondent is a "political subdivision" rather than an "employer" under Section 2(2) of the Act, and that the bargaining unit is not an appropriate unit inasmuch as an election was conducted among employees when they were not actually officiating games.[2]

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Accordingly, we grant the Motion for Summary Judgment.[3]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a nonprofit organization with an office and place of business in Mechanicsburg, Pennsylvania, whose primary purpose is providing uniformity of standards in the interscholastic athletic competitions of its member schools in the Commonwealth of Pennsylvania, including providing the member schools access to its pool of registered sports officials.

In conducting its operations annually, the Respondent purchases and receives at its Mechanicsburg, Pennsylvania facility goods and materials valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] On July 11, 2017, the Board (Members Pearce and McFerran; then-Chairman Miscimarra dissenting) affirmed the Regional Director on review and found that the lacrosse officials in the bargaining unit are "employees" under Sec. 2(3) of the Act, rather than independent contractors. 365 NLRB No. 107, slip op. at 1 (2017). The Board denied review in all other respects. Id., slip op. at 1 fn. 2.

[2] However, the Respondent admits that its refusal to bargain was designed to "obtain judicial review of the certification decision in [Case] 06–RC–152861" and that it "does not oppose the General Counsel's Motion for Summary Judgment."

[3] Chairman Kaplan did not participate in the underlying representation proceeding. He agrees with his colleagues that summary judgment must be granted because the Respondent has not raised any litigable issue in this unfair labor practice proceeding.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the mail-ballot representation election held from August 24, 2015, to September 15, 2015, the Union was certified on September 25, 2015, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All registered sports officials employed by Pennsylvania Interscholastic Athletic Association ("PIAA") who officiate at PIAA-sponsored boys and girls lacrosse games in the geographic areas of Pennsylvania designated as "District VII" and "District VIII" by the PIAA constitution; excluding all office clerical employees and guards, professional employees and supervisors as defined in the Act, and all other employees.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

By letter dated November 5, 2015, the Union requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit employees. Since November 11, 2015, the Respondent has failed and refused to recognize and bargain with the Union.

By letters dated July 31 and August 16, 2017, the Union renewed its request that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit employees. By letter dated August 18, 2017, and continuing to date, the Respondent has failed and refused to recognize and bargain with the Union.

We find that the Respondent's conduct constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since November 11, 2015, and August 18, 2017, respectively, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, Pennsylvania Interscholastic Athletic Association, Inc., Mechanicsburg, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Office and Professional Employees International Union, AFL–CIO (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All registered sports officials employed by Pennsylvania Interscholastic Athletic Association ("PIAA") who officiate at PIAA-sponsored boys and girls lacrosse games in the geographic areas of Pennsylvania designated as "District VII" and "District VIII" by the PIAA constitution; excluding all office clerical employees and guards, professional employees and supervisors as defined in the Act, and all other employees.

(b) Within 14 days after service by the Region, post at its Mechanicsburg, Pennsylvania facility, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Re-

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

gion 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 11, 2015.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 6 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 26, 2018

Marvin E. Kaplan, Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Office and Professional Employees International Union, AFL–CIO (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following appropriate bargaining unit:

All registered sports officials employed by Pennsylvania Interscholastic Athletic Association ("PIAA") who officiate at PIAA-sponsored boys and girls lacrosse games in the geographic areas of Pennsylvania designated as "District VII" and "District VIII" by the PIAA constitution; excluding all office clerical employees and guards, professional employees and supervisors as defined in the Act, and all other employees.

PENNSYLVANIA INTERSCHOLASTIC ATHLETIC ASSOCIATION, INC.

The Board's decision can be found at www.nlrb.gov/case/06-CA-175817 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Pennsylvania Interscholastic Athletic Association, Inc. *and* Office and Professional Employees International Union, Petitioner. Case 06–RC–152861

July 11, 2017

DECISION ON REVIEW AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

On July 30, 2015, the Regional Director for Region 6 issued a Decision and Direction of Election in which she found that the petitioned-for lacrosse officials are employees covered under Section 2(3) of the Act.[1] Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Employer (Pennsylvania Interscholastic Athletic Association or PIAA) filed a timely request for review contending, inter alia, that the officials are independent contractors, excluded from coverage. The Petitioner filed an opposition.

On March 21, 2016, the National Labor Relations Board granted the Employer's request for review with respect to the independent contractor issue.[2] Thereafter, the Employer and the Petitioner each filed a brief on review, as did two amici curiae, the Association of Minor League Umpires, OPEIU Guild 322 (AMLU), and the National Federation of State High School Associations (NFHS). The Employer also filed a brief in response to AMLU's amicus brief, and the Petitioner filed a brief in response to NFHS's amicus brief.

The Board has carefully considered the entire record in this proceeding, including the briefs on review. For the reasons set forth in the Regional Director's decision and the additional reasons set forth below, we affirm the Regional Director's finding that the lacrosse officials are statutory employees. More precisely, we agree with the Regional Director's application of *FedEx Home Delivery*, 361 NLRB No. 55 (2014), enf. denied 849 F.3d 1123 (D.C. Cir. 2017), petition for rehearing en banc denied, Case No. 14-1196 (June 23, 2017) (*FedEx*),[3] and her conclusion that *Big East Conference*, 282 NLRB 335 (1986), enfd. sub nom. *Collegiate Basketball Officials Assn. v. NLRB*, 836 F.2d 143 (3d Cir. 1987) (*Big East*), is not controlling here. We are not persuaded by the arguments of our dissenting colleague, who would find that PIAA carried its burden of establishing that the officials are independent contractors.

I. FACTS

PIAA is a nonprofit corporation whose primary purpose is to promote uniformity of standards in the interscholastic athletic competitions of its member schools. PIAA has 1611 member schools in Pennsylvania, mostly public junior high and high schools, but also including some private schools. Among other things, PIAA provides the member schools access to its pool of "registered sports officials" to referee for various sports during their regular season, and it assigns officials for all postseason playoff games.[4] The Petitioner seeks to represent a unit of approximately 140 officials who officiate at boys' and girls' lacrosse games within two PIAA districts, Districts VII and VIII, covering Pittsburgh and the surrounding area.

Under PIAA's constitution, the board of directors is broadly empowered to determine, inter alia, "the method of and the qualifications for the registration of officials; to determine their powers and duties; and to make and apply necessary policies, procedures, rules, and regulations for such officials." In order to become a registered official, one must meet certain PIAA requirements, pay a registration fee, pass a background check, and receive a score of at least 75 percent on a PIAA-administered test

[1] An election by mail ballot took place as scheduled, and the tally of ballots dated September 15, 2015, showed that the Petitioner won a majority of the votes. No objections were filed. A certificate of representative issued on September 25, 2015.

[2] The Board denied review in all other respects. Then-Member Miscimarra would have granted review with respect to whether the Employer is a political subdivision as well, and he also would have reviewed whether the lacrosse officials are joint employees of the Employer and the public schools that pay them. In his dissent, our colleague reiterates his position that PIAA is a political subdivision of Pennsylvania. For the reasons stated by the Regional Director in her decision, we do not agree. Our colleague also suggests that the officials are jointly employed by PIAA and its member schools, many of which are public, and that this status raises questions about the Board's jurisdiction over the officials. No party made this argument or developed the record on this issue in the hearing before the Regional Director. In any case, even if the officials were jointly employed by exempt entities, such as public schools, and PIAA, that fact would not foreclose the Board's jurisdiction over PIAA. See *Management Training Corp.*, 317 NLRB 1355, 1358 fn. 16 (1995).

[3] We adhere to the independent-contractor analysis adopted by the Board in *FedEx*, supra, notwithstanding the District of Columbia Circuit's decision in that case. The court denied enforcement of the Board's order based on the "law-of-the-circuit doctrine" and the court's decision in a prior case that the court viewed as factually indistinguishable. 849 F.3d at 1127. Even assuming that the court's decision can be read as a continued rejection of the Board's approach on the merits, the Board respectfully declines to acquiesce in the adverse decision of a court of appeals. *Enloe Medical Center v. NLRB*, 433 F.3d 834, 838 (D.C. Cir. 2005); *Nielsen Lithographing Co. v. NLRB*, 854 F.2d 1063, 1066–1067 (7th Cir. 1988).

[4] For boys' and girls' lacrosse, the season is in the spring, approximately from early March to early June. The initial 7 weeks of games are called the "regular" season, and the subsequent weeks of playoffs, finals, and championship games are called the "post-season."

regarding the particular sport. PIAA gives each applicant a copy of the rule book for his or her sport, and it administers tests five times per year. PIAA's local districts and chapters may hold clinics to help prepare applicants for the tests. PIAA's executive director has authority to approve or reject each applicant. Once an applicant's registration is approved, he or she must become affiliated with a PIAA local chapter within 15 days, or else face suspension. A PIAA chapter is a group of officials for a particular sport in a designated geographic area.

PIAA has comprehensive rules covering its own operations and its relationship with its member schools, officials, and other parties. Generally, all parties who participate in PIAA—including member schools, local chapters, and individual officials—must agree to abide by PIAA's policies. Pursuant to those rules, officials are prohibited from joining more than one chapter in the same sport. Thereafter, in order to remain a PIAA official, one must attend at least six chapter meetings during the course of the sport's season, as well as the chapter's annual "rules interpretation meeting," to remain current on the sport's rules and interpretations. Unexcused failure to attend these meetings will result in suspension. Officials must pay annual dues by the end of February, or pay dues plus a late fee by the end of March, in order to work as officials for the following school year. Failure to pay by March 31 results in a 1-year suspension. Officials who comply with these requirements may continue to officiate for an unlimited number of years. Nevertheless, PIAA may suspend or remove any official who does not comply with its constitution and rules.

PIAA sets the overall scheduling parameters for each season, including the length of pre-season practice, the maximum length and maximum number of games for the season, and the date by which the districts' post-season playoff games must be completed. Officials have no ability to alter the season schedule. Once officials are assigned to specific games, PIAA requires them to arrive at least 30 minutes before each game begins. Each game lasts four quarters, with the possibility of overtime. Officials have no ability to shorten or lengthen the assignments.

The officials' assignment to specific games and their compensation during the regular season games differ from the post-season playoff and championship games. During the regular season, member schools schedule the games and arrange for PIAA officials to officiate at those games. Typically, two or three officials are hired or contracted for each varsity game. Schools may contract with individuals known as assignors to assign officials to specific games. After the officials indicate their availability for particular dates, the assignors use that information to offer assignments. Officials may decline regular season assignments if they wish, including if they find the school's proffered fee unacceptable, without being penalized for doing so. Once an official has accepted an assignment, PIAA's policy requires the "host" school and the official to sign a contract, whose form is provided by PIAA. If officials are unable to appear for an assignment they have accepted, for example due to illness, they must notify the assignor to find a replacement. Lacrosse officials average about 14–20 games during the regular season, i.e., 2 or 3 games per week for 7 weeks.

PIAA considers the assignment of regular season games to create a contract between the school and the official. Although PIAA avoids involving itself in negotiations regarding the amount of payment, PIAA has rules governing the process of payment. For example, officials must timely provide schools with tax documents and other information needed for payment. The schools, in turn, must acquire the relevant information and prepare the checks in advance in order to pay officials before the games. PIAA also plays a role in enforcing the contracts. For example, if a school cancels a game for a nonlegitimate reason, PIAA may require the school to pay the officials' fee. Similarly, if a school double-books officials, PIAA may require the school to pay both officials. PIAA's bylaws allow it to suspend a school for "persistent violation" of officials' contracts after a PIAA district committee hearing. PIAA may also put an official on "probation" if the official "cancels" a contract (e.g., by not showing up for the game), and may suspend an official who repeatedly does so.

As for the amount of compensation paid during regular-season games, fees average about $70 per varsity game. PIAA's stated policy is that the fees are a matter to be negotiated between the individual official and the individual school. PIAA expressly disapproves of any attempt to negotiate fees collectively. PIAA policies state that the Board of Directors does not sanction, recognize, or support the establishment of either minimum fees or maximum fees for officiating by schools or officials.

Payments are made on a per-game basis, regardless of how long each game lasts, such as whether it goes into overtime play. During the regular season, the host schools pay the officials directly for the games they officiate. The schools do not withhold money for taxes or Social Security from the officials' checks. During the regular season, the schools are encouraged to evaluate the officials' performance, using a PIAA evaluation form.

After the regular season ends, PIAA controls the schedule of the post-season games and the officials' assignments. The schools are not involved in this process. Specifically, PIAA district committee members assign officials to referee the playoff games within their district. Then, for the inter-district competitions leading up to the statewide championship game, PIAA's executive staff directly selects officials, based in part on the officials' evaluations. Officials must have attended a PIAA convention within the prior 5 years to officiate at post-season games. PIAA unilaterally established a standard fee of $80 for those inter-district games, and directly compensates officials for all post-season games. Taxes and Social Security payments are not withheld. During the entire season, PIAA provides officials with liability insurance, supplemental medical insurance, and accidental death and dismemberment insurance, but it does not provide regular medical insurance, workers compensation insurance, or unemployment insurance. As is described in greater detail below, PIAA maintains far-reaching control over officials' job performance and retains the right to discipline officials for failing to comply with PIAA standards. All PIAA officials are required to wear identical uniforms, which they purchase on their own. PIAA supplies a PIAA emblem or patch, which officials must display on the left sleeve of their uniforms. PIAA also provides registered officials with a PIAA identification card, a copy of the Officials' Manual, and rule books for the particular sport. Officials may not hire other people to perform PIAA assignments on their behalf, nor may they officiate games in more than one geographical chapter in the state. They are not prohibited, however, from officiating non-PIAA games, such as recreational league games and out-of-state games. They are also permitted to maintain outside employment.

Finally, numerous PIAA documents—unilaterally created and imposed by PIAA—state that officials are independent contractors, not employees of PIAA.

II. ANALYSIS UNDER *FEDEX*

The party seeking to exclude individuals performing services for another from the protection of the Act on the grounds that they are independent contractors has the burden of proving that status. *BKN, Inc.*, 333 NLRB 143, 144 (2001). In *FedEx*, 361 NLRB No. 55, the Board clarified and refined its approach to assessing independent-contractor status. Specifically, the Board reaffirmed its reliance on common-law agency principles, as guided by the non-exhaustive list of factors enumerated in the *Restatement (Second) of Agency* §220 (1958). Those factors include: (1) the extent of control over the details, means, and manner of the work; (2) whether the putative contractor is engaged in a distinct occupation or business; (3) whether the work is done under the direction of the principal, or by a specialist without supervision; (4) the skill required; (5) who supplies the tools and place of work; (6) the length of time for which the person is employed/contracted; (7) the method of payment, whether by the time or by the job; (8) whether the work is part of the regular business of the employer; (9) whether the parties believe they are creating an employment or contract relationship; and (10) whether the principal is in the same business. All the incidents of the relationship must be assessed and weighed, with no one factor being decisive. *FedEx,* supra, slip op. at 1, citing *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968); *Roadway Package System, Inc.*, 326 NLRB 842, 849 (1998) (*Roadway*). In addition, the Board stated that it would consider the extent to which a putative contractor is, in fact, rendering services as part of an independent business with an actual (not merely theoretical) entrepreneurial opportunity for gain or loss. *FedEx*, slip op. at 1.

Applying the *FedEx* analysis here, we find that the Employer has failed to establish that the officials are independent contractors rather than employees. Although there are certain aspects of the relationship between PIAA and the officials that may suggest the officials are independent contractors, we find that those aspects are outweighed by the factors showing that the officials actually are employees. In particular, we find that employee status is demonstrated by the extent of PIAA's control over the officials, the integral nature of the officials' work to PIAA's regular business, PIAA's supervision of the officials, the method of payment, and the fact that the officials do not render their services as part of an independent business.

1. Extent of control by employer

PIAA has far-reaching control over the means and manner of the officials' work through its comprehensive rules. Of particular note, PIAA's constitution broadly empowers its board of directors to determine, inter alia, "the method of and the qualifications for the registration of officials; to determine their powers and duties; and to make and apply necessary policies, procedures, rules, and regulations for such officials." Acting in accordance with that authority, PIAA selects officials for their positions after applicants complete a background check and achieve the required proficiency on a PIAA-administered examination. Then, officials must attend PIAA chapter meetings and annual training to remain eligible to officiate. On the job, the board of directors maintains a variety of work rules, including rules that specifically control

the officials' job performance.[5] Moreover, although officials are not directly supervised during games (insofar as no one from PIAA is physically present to watch them officiate), there are mechanisms in place by which the officials are held accountable to PIAA for their on-field performance and which may result in discipline.[6]

Although the officials have some discretion over certain aspects of the means and manner of their work, the rules and regulations demonstrate that PIAA nevertheless exercises "pervasive" control over their officiating. *FedEx*, supra, slip op. at 12–13 (drivers' discretion over aspects of their work outweighed by employer's requirements). In this respect, the officials are similar to the canvassers found to be employees in *Sisters' Camelot*, 363 NLRB No. 13 (2015). In that case, the canvassers were free to work or not work as they chose, but when they did choose to work, they were subject to significant employer requirements (including specific start and end times, limitations on their geographic work areas, and detailed record-keeping) and could be disciplined for failing to comply with those requirements. Id., slip op. at 2. Here too, the actual officiating occurs within the specific lacrosse rules that PIAA adopted (and interprets on an ongoing basis), as well as ethical rules requiring impartiality and other PIAA-imposed controls. Furthermore, officials face the possibility of discipline for failing to comply with those controls.

Finally, although PIAA cites other Board cases for the proposition that a principal may exercise some control over the work in order to achieve the desired *end* without becoming an employer, those cases are distinguishable. For example, in *Pennsylvania Academy of the Fine Arts*, 343 NLRB 846, 847 (2004), the independent-contractor models were given general poses to strike in the art studio (i.e., the end to be achieved), but (1) they received no on-the-job training; (2) they retained "significant discre-

[5] For example, PIAA's rules require officials to be in good physical shape, to perform good "officiating mechanics" on the field, to have complete command of the sport's rules (as set forth in the PIAA rulebook and as continually interpreted by PIAA), and to make accurate and unbiased calls. On this last count, the Officials' Manual requires officials to remove themselves from a game if they are related to one of the athletes or have any other connection that would call their impartiality into question. Officials must also follow all of PIAA's policies, such as filing a report within 24 hours if they disqualify any coaches or players for misconduct during the game.

[6] In arguing that PIAA does not control the means and manner of the officials' work, our dissenting colleague focuses only on the rules of the lacrosse game itself, which PIAA adapts from the National Federation of State High School Associations. However, PIAA's control over officials' work is not limited to those rules, but rather is embodied in PIAA's own rule-interpretation bulletins and its Officials' Manual. Significantly, PIAA has adopted a procedure through which schools or other parties may request an official's discipline or removal. The Manual lists various levels of potential discipline for various levels of infractions, such as failing to attend the required meetings; canceling a contract with a member school; failing to wear the required uniform; failing to comply with other PIAA regulations; being biased, incompetent, or unfair while officiating a game; failing to submit a report within 24 hours of disqualifying a player or coach; failing to cooperate with PIAA in any investigation; and committing certain crimes of dishonesty, violence, or child endangerment. Aside from this procedure, member schools also submit evaluations of officials during the regular lacrosse season, which PIAA uses to select officials for the post-season games.

Although the record contains no examples of PIAA actually disciplining or removing officials, it is clear that PIAA possesses the authority to do so. This authority supports a finding of employee status. See *Friendly Cab Co.*, 341 NLRB 722, 724 (2004) enfd. 512 F.3d 1090 (9th Cir. 2008) (right to discipline supports employee status). See also *Restatement (Second) of Agency* §§ 2(2) & 220(1) (master (employer) is someone who "controls or has the *right to control*" another; and servant (employee) is "subject to the [employer's] control *or right to control*" (emphasis added)); *NLRB v. Associated Diamond Cabs*, 702 F.2d 912, 920 (11th Cir. 1983) ("courts have noted that it is the *right* to control, not the actual exercise of control, that is significant"). Cf. *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 2 (2015) (even occasional instances of discipline indicate significant employer control) (citing *Dial-A-Mattress Operating Corp.*, 326 NLRB 884, 889, 892–893 (1998)). Looking at the precise question at issue here—the unexercised authority to discipline sports officials—the Third Circuit emphasized that the salient question was whether the putative employer maintained "the right to fire, and thus a right to control, the officials." *Collegiate Basketball Officials Assn. v. NLRB*, 836 F.2d at 148.

Our dissenting colleague sees an inconsistency in giving weight to a putative employer's right to control another, but not to a putative independent contractor's right to hire others to perform the work (a consideration in whether a putative independent contractor renders services as part of an independent business). We disagree. First, the Restatement directly speaks to the unexercised right to control work, stating that such authority supports employee status. There is no parallel statement that the mere authority to hire others to perform the work supports independent contractor status. Second, the contexts are materially different. When looking at whether a putative independent contractor actually is functioning as an independent business, the Board recognizes that employers may ostensibly allow employees to hire others to perform the work, but in reality impose constraints that effectively nullify that option. See *FedEx*, supra, 361 NLRB No. 55, slip op. at 12. The Board's experience does not suggest that a putative employer's right to control workers is subject to being rendered illusory in a comparable manner. Thus, what our colleague calls a "double standard" is simply the ordinary application of legal principles to a materially different set of facts. But even if the factual circumstances were analogous in the two contexts, as the dissent suggests, legal considerations nonetheless undercut the dissent's proposed equivalence. Thus, in asserting that, "[i]f the Board will not attach significance to potential authority when it fails to support employee status, then the Board may not validly rely on such potential authority here," the dissent disregards the Act's preference for the inclusion of workers as employees under the Act's protection, rather than their exclusion. See Sec. 1, stating the Act's policy to "encourag[e] the practice and procedure of collective bargaining and . . . protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing." See also *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 297 (1996) ("[A]dministrators and reviewing courts must take care to assure that the exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach.").

tion" regarding the manner of posing, given their understanding of light, shadow and other artistic elements, and the physical skill required to hold strenuous poses; and (3) their work was not subject to supervision, evaluation, or discipline by the Academy.[7] Here, by contrast, PIAA exerts much more control over the manner of officials' work, including imposing specific rules for calling lacrosse games and ethics rules, and maintaining the authority to enforce those rules against the officials. In short, we find that PIAA's control over the manner of work weighs in favor of the officials' employee status.[8]

2. Whether individual is engaged in a distinct occupation or business

We agree with the Regional Director that this factor favors finding employee status for the officials. The fact that an individual holds a distinct occupation may indicate independent contractor status in certain situations, particularly where the individual's services are engaged temporarily to accomplish tasks incidental to the employer's regular business.[9] But the circumstances presented here show that this factor actually supports finding the officials to be employees. The officials perform their functions in furtherance of PIAA's core operations, so much so that PIAA would not be able to function without them. See *United Insurance*, 390 U.S. at 258–259 (considering as one "decisive" factor that employees' functions were an "essential part of the company's normal operations"); *Slay Transportation Co.*, 331 NLRB 1292, 1294 (2000); *Roadway,* supra, 326 NLRB at 851. They are also fully integrated into PIAA's operations, as the performance of their work depends on completion of the PIAA certification process and compliance with its rules, as well as the use of PIAA forms, emblems, assignment mechanism, and evaluation mechanism. When PIAA lacrosse officials take the field to perform their duties, they do so in the name of PIAA, not in their own names.

Our dissenting colleague concedes the critical point that the officials are an integral part of PIAA's operation, but he finds this factor inconclusive because PIAA does not restrict officials' ability to officiate games for other entities. That ability, however, does not alter or diminish the fact that the officials are an integral part of PIAA's core function. Our colleague's position is contrary to the well-established, widely-recognized principle that part-time or casual employees covered by the Act often work for more than one employer. *Lancaster Symphony Orchestra*, 357 NLRB 1761, 1765 (2011) (citing *KCAL-TV*, 331 NLRB 323, 323 (2000)), enfd. 822 F.3d 563 (D.C. Cir. 2016); see also *Sisters' Camelot*, supra, slip op at 2 ("the ability to work for multiple employers does not make an individual an independent contractor.")

3. Whether the work is usually done under the direction of the employer or by a specialist without supervision

PIAA lacrosse officials have no direct supervision on the playing field and an official's calls cannot be directly appealed. This lack of direct supervision, however, reflects the nature of officiating, rather than suggesting independent-contractor status. *Collegiate Basketball Officials Assn. v. NLRB*, 836 F.2d 143, 148 (3d Cir. 1987) ("That the officials' rulings are not appealable has more to do with basketball than the employment status of the referees."); see also Restatement (Second) of Agency § 220(1) cmt. D (the full-time cook is regarded as a servant although it is understood that the employer will exercise no control over the cooking). Nonetheless, as the Regional Director described, PIAA tightly controls the work that the officials perform through mandatory adherence to rules, regulations, policies, and procedures. From the outset, PIAA certifies the officials by administering an examination of the officiating rules, it maintains the rule book that the officials apply, and it requires the officials to attend ongoing chapter meeting and training sessions. PIAA Assistant Executive Director Patrick Gebhart is responsible for the oversight of the officials'

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[7] See also *DIC Animation City, Inc.*, 295 NLRB 989, 991 (1989), where the television producer's control of the script-writers' work "relate[d] primarily to the end product" (e.g., ensuring that it would fit within a 30-minute format), while the independent-contractor writers retained control over the manner of work (e.g., when and where to work, whether to work as a team, etc.).

[8] Our colleague cites rulings by other governmental bodies finding that amateur sporting officials are independent contractors. However, the Board "has long recognized that rulings by other governmental agencies on the question of employee versus independent contractor status are to be given consideration albeit not controlling consideration." *City Cab of Orlando*, 285 NLRB 1191, 1195 (1987), citing *Lorenz Schneider Co.*, 209 NLRB 190, 191 fn. 5 (1974), enf. denied 517 F.2d 445 (2d Cir. 1975). As we note below, cases in this area turn on their particular factual circumstances, even assuming (dubiously) a uniform legal standard across different statutes and jurisdictions. Of course, there is nothing inherent in sports officiating that somehow precludes officials from being employees. Professional sports officials, including minor league umpires, are frequently treated as employees and have collective-bargaining representatives. In addition, the Internal Revenue Service found that the amateur collegiate sports officials at issue in a revenue decision were employees for federal taxation purposes. Revenue Ruling 57-119, 1957-1 C.B. 331 (1957). It is true, as our dissenting colleague observes, that in a later ruling the IRS found that the officials working for a particular high school athletic association were independent contractors. Revenue Ruling 67-119; 1967-1 C.B. 284 (1967). But, in our view, that simply demonstrates that the IRS, like the Board, applies a case-by-case analysis of the relevant factors in determining employee status versus independent contractor status and does not make categorical classifications based on job titles.

[9] See Restatement (Second) of Agency § 220(2) cmt. I (observing that if the occupation, even a highly skilled one, is considered part of the regular business of the employer, there is an inference that the individual is a servant).

compliance with PIAA rules and described his primary responsibility as being "the supervisor of the officials." Furthermore, officials are evaluated on their job performance through a PIAA evaluation mechanism that can determine their future job opportunities with PIAA, which is another way of saying that the work is done under the direction of the employer.[10] For those reasons, we agree with the Regional Director that this factor favors finding the lacrosse officials to be employees. See *FedEx*, supra, slip op. at 13 (finding that, "[a]lthough drivers are ostensibly free of continuous supervision in their work duties," the supervision factor favored employee status because the employer essentially directed the drivers' performance by enforcing its rules, by requiring adherence to protocols regarding the drivers' dress, appearance, and safety and the performance of their work, by auditing and appraising the drivers' performance, and by reserving the right to impose disciplinary measures for poor performance); see also *Sisters' Camelot*, supra, slip op. at 3 (despite absence of immediate in-person supervision, employer's use of various oversight tools supported finding that the supervision factor favored employee status).

Our dissenting colleague disagrees with our conclusion that PIAA's supervision of the officials favors finding the officials to be employees, largely because the officials' in-game calls about penalties, goals, and other officiating decisions are not subject to review. In our view, though, that analysis is wide of the net. The question is not whether any specific call is subject to review, but whether each official's body of work as a whole and the officials' compliance with the policies set forth in the PIAA Manual are subject to review and supervision, which they clearly are.[11] Instead, in light of the PIAA's wide-ranging rules governing officials' conduct and its evaluation of officials for their adherence to PIAA policies, we find that the supervision factor favors finding the officials to be employees.

4. Skill required in the occupation

Officials must have particularized skills to officiate a game, but their level of skill does not preclude finding them to be employees. Indeed, many types of employees covered by the Act are highly skilled with expertise in a particular field.[12] As with all of the relevant factors, this factor must be examined in the particular circumstances presented.[13] Here, we find it significant that the officials' skills are integral to PIAA's ability to accomplish its core mission, which tends to show that they are employees, rather than specialists providing ad hoc services. See Restatement (Second) of Agency § 220(2) cmt. I. We also find it significant that PIAA itself certifies the officials and requires them to receive ongoing PIAA training to remain eligible. This in-house certification and training further undermines the impression that the officials are selling their skills and expertise on the open market. Cf. *Sisters' Camelot*, supra, slip op. at 3 (that employer provided workers with the training necessary to perform the work supported finding employee status); see also *NLRB v. United Insurance Co.*, 390 U.S. at 258–259 (agents lacked prior experience and were trained by company personnel, which supported employee status). For those reasons, we find that this factor tends to favor employee status, or is at least inconclusive.

[10] On this issue, our colleague erroneously discounts the role of PIAA in evaluating the officials' performance simply because the state of Pennsylvania, by statute, requires PIAA to conduct certain evaluations. Although PIAA Assistant Executive Director Gebhart testified that PIAA is required by law to evaluate the officials' performance in post-season games, PIAA goes beyond that requirement by encouraging schools to submit evaluations of the officials' performance in regular-season games; PIAA then uses those regular-season evaluations to select officials for inter-district games. In any event, to the extent state law mandates evaluations, PIAA developed and administers the evaluation system. And, in connection with that system, PIAA maintains its authority to discipline officials for various reasons, including canceling a contract, failing to submit a report after disqualifying a player, or being palpably unfair in officiating decisions. In short, although the state requires PIAA to evaluate the officials' performance in certain games, PIAA continuously monitors the officials' work throughout the season, going beyond what the state requires. Certainly, in this respect, PIAA is not merely acting as a pass-through for governmental regulators. For that reason, we find this case is distinguishable from cases stating that a company does not exercise control over putative employees by requiring compliance with government regulation. Cf. *NLRB v. Associated Diamond Cabs*, 702 F.2d at 922 (finding that a taxi company did not exercise control over drivers by requiring that they fill out a trip sheet where the city code required that employees fill out the trip sheet and the employer's only use of the trip sheet was to store it for government inspection).

[11] Our colleague correctly observes that the judge in *Big East* relied on the lack of supervision to support finding that the officials were independent contractors, but we find the supervision in that case is distinguishable. 282 NLRB at 343–344. As we more fully discuss below, the putative employer in *Big East* did not select or certify the officials, and it shared the evaluation and supervisory functions with an entity that represented the officials. Thus, the supervisory roles of PIAA and the relevant association in *Big East* are significantly different.

[12] See, e.g. *Lancaster Symphony Orchestra*, 357 NLRB 1761, 1766 (2011) (professional musicians), and cases cited; *CNN America, Inc.*, 361 NLRB No. 47 (2014) (various bargaining units included camera operators, audio operators, engineering personnel, and other technical employees engaged in broadcast industry); *Stage Employees IATSE Local 720 (California Sports)*, 271 NLRB 282 (1984) (members of bargaining unit consisted of technical director, camera operators, video operators, videotape operators, and audio operators who perform sports-broadcasting work).

[13] See Restatement (Second) of Agency § 220(2) cmt. I (observing that even highly skilled artisans may be employees depending on the circumstances).

5. Whether the employer or individual supplies the instrumentalities, tools, and place of work

PIAA rules require that the officials work games at specified places and times. PIAA thus provides the place and time of work, both indirectly through its agreements with schools during the regular season, and by directly designating the sites and times for post-season games. That favors employee status. *Sisters' Camelot*, supra, slip op. at 3. But it is also true, as PIAA argues, that the officials must provide their own equipment, consisting of whistles, pencils, uniforms, hats, penalty markers, timing devices, and scorecards. (There is no suggestion that PIAA was contracting with the officials for the use of the tools or instrumentalities, however.) On balance, we view this factor as favoring independent contractor status but do not find it particularly weighty.

6. Length of time for which an individual is employed

We agree with the Regional Director that this factor is inconclusive. PIAA registers officials annually. The officials then work two or three games a week, on average, for 7 weeks and additional games during the playoffs. As the Regional Director observed, the single game assignments are short-term, but that has a more direct bearing on the relationship, if any, between the schools and officials, versus between PIAA and the officials. The employment relationship between the officials and PIAA is less decisively short-term. Furthermore, the lacrosse officials have an expectation of continued employment with PIAA as long as they pay their annual dues and meet PIAA's other performance standards, such as testing requirements and attendance at chapter meetings and rules interpretation meetings. See, e.g., *Lancaster Symphony*, 357 NLRB at 1766 (recurrent short-term employment renders length-of-time consideration inconclusive). Indeed, many officials work for PIAA for many years, and there are specific PIAA provisions for recurrent officials. PIAA offers a re-registration discount for officials who pay their annual dues early. In addition, in order to officiate playoff games, PIAA requires that officials attend an annual rules interpretation meeting at least once every 5 years. These facts suggest an expectation that officials will work for PIAA over a number of years.

7. Method of payment

The Regional Director acknowledged that officials are paid on a per-game basis, regardless of how long each game lasts, and that such payment "by the job" tends to show independent contractor status, citing *Porter Drywall, Inc.*, 362 NLRB No. 6 (2015), and other cases. However, she went on to find that, on balance, the method of payment factor weighs in favor of employee status, primarily because PIAA controls the compensation process within which member schools and officials operate during the regular season, and also because PIAA unilaterally sets the amount of payment for post-season games. We agree with the Regional Director's conclusion that this factor favors employee status.

Certain facts do indeed point toward independent contractor status. In addition to the per-game payment, no withholdings are deducted from the officials' fees. Officials do not receive regular medical insurance or other types of fringe benefits; however, the significance of this is reduced by the fact that PIAA provides the officials with some types of insurance (liability, excess accident medical, and death and dismemberment).[14] These considerations must be balanced against others favoring employee status. Thus, in *FedEx*, supra, slip op. at 14, the absence of an hourly wage, withholdings, and fringe benefits was outweighed by the putative employer's establishment, regulation, and control of a non-negotiable compensation system, which minimized the drivers' possibility of financial risk and gain. See also *Sisters' Camelot*, supra, slip op. at 4 (although canvassers' income depended on how often and efficiently they worked, the non-negotiable commission rate and putative employer's control of compensation system that minimized canvassers' opportunity to make more money weighed in favor of employee status).

Here, too, PIAA's control over the officials' compensation system outweighs the considerations supporting independent contractor status. To begin, there is no dispute that PIAA (including its district committees) unilaterally determines the amount of compensation for post-season games.[15] We have repeatedly held that a putative employer's unilateral or non-negotiable establishment of the compensation rate favors employee status. See *FedEx*, supra, slip op. at 14; *Sisters' Camelot*, supra, slip op. at 4; *Lancaster Symphony*, 357 NLRB at 1765–1766.

For regular-season games, the record demonstrates that PIAA directly controls the process[16] by which its mem-

[14] *Porter Drywall*, supra, slip op. at 3 (citing *Dial-A-Mattress Operating Corp.*, 326 NLRB at 891) (assuming liability for the asserted employees' damage is "customary" in employer-employee relationship, whereas requiring them to carry liability insurance suggests independent contractor status).

[15] The record shows that PIAA district committees assign officials to referee the playoff games within their district, although the record does not indicate exactly how much PIAA pays officials for those games. Then, for the inter-district competitions leading up to the statewide championship, PIAA's executive staff directly selects officials and has unilaterally established a "standard" fee ($80 per game) that it pays officials.

[16] As previously described, PIAA requires that, for each regular-season game, the "host" school and each official sign a contract, and PIAA provides the contract form. In addition, PIAA requires schools

ber schools pay the officials, and that it also indirectly influences the determination of the amount of payment. PIAA's stated policy is that the fees are a matter to be negotiated between individual officials and individual schools and that PIAA has no position regarding the amount of regular-season fees. But—as set forth in its Officials' Manual—PIAA also expressly disapproves of any attempt to negotiate fees collectively, including officials acting as a group via their respective chapters:

> The Board of Directors does not concede the right to any Chapter of Officials to establish minimum fees for officiating in interscholastic games. The Board of Directors, likewise, does not accord the right of any league or organized group of member schools to establish maximum fees for officials who officiate in their games.... The Board of Directors will not sanction, recognize, or support the establishment of either minimum fees or maximum fees for officiating Regular Season Contests by either any Chapter of Sports Officials or organized group of member schools.

Thus, PIAA's refusal to "concede" any right to PIAA chapters (or any group of officials) to try to negotiate minimum fees, combined with its authority to revoke the charter of any PIAA chapter,[17] significantly reduces the officials' ability to negotiate their compensation. In addition, PIAA's power to forbid officials from collectively seeking more compensation is inconsistent with any claim that the officials are truly "independent" business people with an opportunity for entrepreneurial gain during the regular season.[18]

Finally, we note that PIAA exerts substantial control over the officials' overall earnings for the season by forbidding them from officiating in more than one geographic chapter in the state, similar to the employer's control over the drivers' service areas in *FedEx*. As stated in that case, such constraints on individuals' potential compensation also weigh in favor of employee status. *FedEx*, supra, slip op. at 14. See also *Sisters' Camelot*, supra, slip op. at 4 (assigning each canvasser to a strictly delineated area exhibits "tight control" over his/her compensation).

In sum, we agree with the Regional Director that, on balance, the method of payment factor favors employee status.[19]

8. Whether the work is part of the regular business of the employer and 10. Whether the principal is or is not in the business

These two closely related factors favor finding the officials to be employees, as the dissent acknowledges. PIAA's business is providing a system of fair play for interscholastic sports. The officials are an integral part of that business. See, e.g., *Lancaster Symphony*, 357 NLRB at 1765. PIAA could not perform its business operations without the work of its officials. Indeed, a pool of qualified and certified lacrosse officials is one of the primary services that PIAA provides to its member schools. These factors strongly support finding the officials to be employees, as the dissent recognizes.

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to pay the officials before each game, and the record establishes that PIAA retains the authority to enforce contracts between the member schools and the officials. On this last point, PIAA can require a school to pay officials if the school cancels a game for an unapproved reason, can require a school to pay all officials if a school has double-booked them, and can put an official on probation for failing to show up to a game. PIAA can also suspend a school for "persistent violation" of officials' contracts (following a PIAA district committee hearing), and can suspend officials for repeatedly failing to show up to games.

PIAA briefly argues that because the member schools pay officials for regular-season games, the officials are "if anything, independent contractors of the schools, not PIAA." This argument disregards the undisputed fact that PIAA directly pays officials for postseason games. In addition, the circumstances described above illustrate that PIAA exercises substantial control over the process by which the officials are compensated for regular-season games, and its policy forbidding collective efforts to increase compensation shows that it also has at least some involvement in determining the amount of regular-season compensation. Thus, PIAA determines matters governing this essential term of employment, and the fact that it does not directly pay the officials for regular-season games does not show that it is not the officials' employer. Cf. *BFI Newby Island Recyclery*, 362 NLRB No. 186, slip op. at 2, 4 (2015) (noting, in reaching joint employer finding, that one of the two joint employers issued paychecks to employees at issue). Of note, no party here contends that PIAA-member schools are joint employers of the officials.

[17] PIAA issues a charter to create a new chapter whenever at least 15 officials apply. PIAA can revoke a charter if the chapter "fails to fulfill" its specified purpose.

[18] Our colleague asserts that PIAA's restrictions on officials negotiating minimum fees are consistent with legal prohibitions on independent contractors colluding to set prices under antitrust laws. Of course, that position presumes that the officials are independent contractors. Employees' right to negotiate collectively is protected by the Act and exempt from antitrust laws. In any event, the record does not support our colleague's assertion that PIAA restricts officials' ability to negotiate minimum payments for antitrust reasons. Instead, the record shows that one of PIAA's roles is to mediate disputes over fees that arise between schools and officials. It is PIAA's interest in managing and limiting the scope of fee disputes that animated PIAA's rules on collective negotiation. Moreover, PIAA's prohibition on schools establishing maximum fees is a significant intervention into the compensation process for officials, irrespective of whether the officials are the beneficiaries. Thus, our point remains: by establishing the manner in which compensation could be negotiated and the work opportunities available to officials, PIAA is extensively involved in setting the compensation available to the officials.

[19] In affirming the Regional Director's conclusions with respect to this factor, we do not rely on her statement that member schools pay the officials "at PIAA's behest."

9. Whether the parties believe they are creating an independent-contractor relationship

Numerous PIAA documents state that officials are independent contractors, not employees of PIAA. However, all of those documents are unilaterally created and imposed by PIAA, which diminishes the weight to be given them. See *FedEx*, supra, slip op. at 14. We therefore find this factor is inconclusive in determining the status of the officials.

11. Whether the evidence shows the individual is rendering services as part of an independent business

In addition to the factors listed in the *Restatement*, the Board also considers the extent to which a putative contractor is, in fact, rendering services as part of an independent business with an actual (not merely theoretical) entrepreneurial opportunity for gain or loss. *FedEx*, supra, slip op. at 1. As the Regional Director found, some considerations indicate that the officials have a measure of entrepreneurial opportunity (e.g., their ability to accept or decline assignments and to officiate non-PIAA games), but these considerations are plainly outweighed by others favoring employee status. Significantly, officials do not render officiating services as part of their own enterprises, cannot hire others to perform their tasks, do not control most scheduling matters or other important business decisions, and are required to use documents that PIAA drafts and changes unilaterally. In addition, as noted above, PIAA substantially constrains the officials' ability to earn more money by, for example, limiting each official to one geographic chapter in the state. Finally, the record fails to show how many opportunities officials have to officiate in non-PIAA games, such as out-of-state games, and thus does not demonstrate that the officials have an actual (as opposed to theoretical) opportunity for gain.

These limitations place the officials in a position similar to that of the musicians in *Lancaster Symphony*. In that case, the Board stated:

> The musicians are paid a set fee for a set number of rehearsals and performances. The fees are unilaterally set by the Orchestra and there are no negotiations over such fees. The musicians do not receive more or less money based on ticket sales, or how well or poorly they perform in a given performance. In addition, there is no indication that musicians can assign or sell their seat in the Orchestra….
>
> The fact that the musicians can decide not to work in a particular program or request to work in more programs does not mean that they enjoy an opportunity for entrepreneurial gain suggesting a finding that they are independent contractors. The choice to work more hours or faster does not turn an employee into an independent contractor. To find otherwise would suggest that employees who volunteer for overtime, employees who speed their work in order to benefit from piecerate wages, and longshoremen who more regularly appear at the "shape up" on the docks would be independent contractors. We reject that notion.

357 NLRB at 1764–1765 (internal citation and footnote omitted). See also *Sisters' Camelot*, supra, slip op. at 5 (the fact that canvassers could decide whether to work on a given day and could increase earnings by making themselves available for more work did not favor independent-contractor status, where they had no control over important business decisions such as where they solicited donations or whether to hire or subcontract the work).[20] Here, too, the fact that officials may seek to increase their income by making themselves available for as many games as possible during the season does not make them independent contractors, but instead renders them analogous to employees who "shape up" more regularly. Similarly, the fact that the officials have the ability to pursue other officiating or non-officiating work does not show that they are independent contractors with entrepreneurial opportunity, but simply reflects the part-time, intermittent nature of their PIAA officiating schedule. See *Lancaster Symphony*, supra at 1765.[21]

Finally, reflecting common-law agency principles, we have held that being paid by the job tends to show independent-contractor status at least in part because if a contractor can do the job more quickly and efficiently, he or she may have more time or opportunity to obtain other jobs. See *DIC Animation City*, 295 NLRB 989 (finding writers who were paid a flat fee for a script were independent contractors); *Porter Drywall*, supra, slip op. at 4–5 (finding crew leaders who were paid a rate based on square footage rather than based on time, and who made important business decisions such as setting the crew size for the job, were independent contractors). In this case,

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[20] Our colleague would find that the inability of officials to hire replacements to officiate games or otherwise sell the work assignment is not persuasive because, in his view, officials are not fungible. We note, however, that the record contains no indication that officials are chosen for regular-season games based on any factors except their PIAA-determined eligibility and their availability to officiate. In any event, our colleague cites no legal authority for his position. Notably, the Board and courts have found that the inability of workers comparable to the officials here—orchestra musicians—to sell their job assignments was an important consideration. *Lancaster Symphony*, 357 NLRB at 1764–1765.

[21] Assessing the entrepreneurial opportunity of the musicians in *Lancaster Symphony*, the District of Columbia Circuit described the weight given to the ability to work for other employers as miniscule and noted that, if otherwise, it "might lead to almost automatic classification of many part-time workers as contractors." 822 F.3d at 570.

however, the lacrosse game "jobs" last a certain amount of time, and there is nothing officials can do to complete each job more quickly or efficiently in order to increase their opportunity to contract for more jobs in a given time period. Like the musicians in *Lancaster Symphony* who had no ability to perform the concert "jobs" faster, the lacrosse games' inflexible duration does not provide any entrepreneurial opportunities to maximize efficiency and increase income. 357 NLRB at 1765, fn. 8.

These considerations strongly support the conclusion that officials do not, in fact, operate independent businesses with entrepreneurial opportunity within the meaning of *FedEx* and, in turn, our overall conclusion that the officials were employees.

Finally, we reject PIAA's contention that the Regional Director's finding that the officials are employees departed from Board precedent, specifically, the Board's decision in *Big East*, 282 NLRB 335 (1986). Decided 30 years ago, *Big East* pre-dates both the Board's decision in *FedEx* and what the *FedEx* Board correctly described (361 NLRB No. 55, slip op. at 2) as the Board's "seminal decision" in the independent-contractor area, *Roadway Package System*, 326 NLRB 842, decided in 1998. In *Big East*, the Board affirmed the ALJ's finding that, on the facts of that case, the college basketball officials in the proposed unit were independent contractors. Contrary to our dissenting colleague's treatment of this issue, the decision did not announce a per se rule that sporting officials are independent contractors; rather, it recognized that each case raising employee-status issues must be decided on its own facts. Indeed, a categorical exclusion would be inconsistent with the Board's longstanding analytical approach. For example, the Board has examined whether cab drivers and truck drivers were employees or independent contractors many times, and the outcome has turned on a careful, case-specific examination of the relevant facts, not an industry-wide classification. Compare *Mitchell Bros. Truck Lines*, 249 NLRB 476, 480 (1980) (finding truck owner-operators to be employees) with *Austin Tupler Trucking*, 261 NLRB 183, 185 (1982) (truck owner-operators were independent contractors); also compare *City Cab Co. of Orlando I*, 242 NLRB 94 (1979), enfd. 628 F.2d 261 (D.C. Cir. 1980) (taxi drivers were employees) with *City Cab Co. of Orlando II*, 285 NLRB 1191, 1209 (1987) (finding that the same taxi drivers considered in the previous case were now properly categorized as contractors because there were significant factual changes that compelled a different outcome). As the Board has explained, in evaluating independent-contractor status, "the weight to be given a particular factor or group of factors depends on the factual circumstances of each case." *FedEx*, supra, slip op. at 2, citing *Roadway*, supra, 326 NLRB at 850. This principle is well established. See id. at fn. 10 (collecting cases). See also *Austin Tupler Trucking*, 261 NLRB at 184, decided before *Big East*, where the Board had observed that

> [T]he same set of factors that was decisive in one case may be unpersuasive when balanced against a different set of opposing factors. And though the same factor may be present in different cases, it may be entitled to unequal weight in each because the factual background leads to an analysis that makes that factor more meaningful in one case than in the other.

The *Big East* decision, then, neither permits nor requires the Board to dispense with a careful analysis of the record in this case. As we now explain, there are decisive differences in the relationship between the officials and the putative employer in *Big East* as compared to the lacrosse officials and PIAA.

Big East involved officials of the Eastern College Basketball Association (ECBA), who, similar to PIAA's lacrosse officials, possessed certain skills, paid for their own uniforms and equipment, and were paid on a per-game basis. They could also choose to make themselves available for more or fewer ECBA games, officiate at non-ECBA games, and pursue other, non-officiating employment. We have addressed similar considerations in our analysis here, and those similarities must also be weighed against important differences between the officials here and those in *Big East*.

The administrative law judge in *Big East* acknowledged that the case was close,[22] but found that the basketball officials were independent contractors who sold their skill and expertise, with "some control" over their earnings. 282 NLRB at 345. In significant part, the judge relied on the role of the Collegiate Basketball Officials Association (CBOA) which represented the officials in their dealings with ECBA. CBOA—as the officials' group—played an unusually active role in determining who would be eligible for assignment to ECBA games.[23] CBOA also negotiated agreements with ECBA on an annual basis, which included a fee payment schedule and

[22] The judge described the case as "not unlike most in this area that present very close mixed questions of law and fact," noting that "[d]ifferent adjudicators can look at the same facts and come to different results," and called the decision "a close one and not entirely free from doubt." 282 NLRB at 345.

[23] Initially, officials could join CBOA only if they had already been "approved" by another officials' organization and passed its tests, and then CBOA would then determine whether they were medically fit to officiate. Further, CBOA's evaluation of officials' performance during the season constituted 40 percent of their yearly ranking, which in turn affected their eligibility for ECBA assignments in the following season.

independent contractor language, and provided liability insurance for its official-members. The judge pointed to the CBOA's "cooperative" role to highlight what ECBA did *not* do as a putative employer.[24]

There is, of course, no similar group in this case that mitigates PIAA's control in the way the CBOA mitigated the ECBA's control over the officials in *Big East*. Specifically, whereas CBOA pre-screened officials for initial eligibility, PIAA itself tests and selects its own list of registered officials eligible for game assignments. Furthermore, PIAA's own chapters—which it charters and which it can abolish—provide ongoing training to officials and may evaluate their work during the regular-season games, with no input from an independent officials' group like CBOA. Unlike *Big East*, where CBOA and ECBA worked cooperatively to enforce standards for officials' behavior, PIAA alone has authority to investigate and discipline or remove its lacrosse officials. In addition, unlike the situation in *Big East*, where CBOA provided liability insurance via the officials' dues, PIAA itself provides liability insurance to its officials, which is an indication of employer status. *Porter Drywall*, supra, slip op. at 3.[25]

In any case, the Board's analysis of independent contractor status has evolved considerably in the 30 years since *Big East* was decided. Certain factors that were significant in *Big East* no longer favor independent contractor status in light of our subsequent decisions. The judge in *Big East* found that the officials "seem[ed] to operate their own independent business" because they had other full-time jobs and could refuse to accept ECBA games at their discretion. 282 NLRB at 343, 345. In *FedEx*, however, the Board explained that the critical inquiry in evaluating entrepreneurial opportunity is whether the putative contractor has a realistic opportunity to provide similar services for other companies, has a proprietary interest in her work, and has control over important business decisions. 361 NLRB No. 55, slip op. at 12. The *Big East* decision does not conform to that analysis. It did not inquire whether the entrepreneurial opportunities were actual (or merely theoretical) or consider constraints imposed by the employer. It did not consider whether the officials had a proprietary interest in their work or whether they had control over important business decisions. Instead, in a way that is inconsistent with recent cases, it relied on the fact that officials could work more hours, block off certain dates, and work for multiple employees. Under our current jurisprudence, we think it is clear that the entrepreneurial opportunity factor would favor employee status, rather than independent contractor status. E.g., *Lancaster Symphony*, 357 NLRB at 1765; *Sisters' Camelot*, supra, slip op. at 5.[26]

Given the factual distinctions between this case and *Big East*, as well as the evolution in Board law since *Big East* was decided, we have no difficulty in rejecting PIAA's argument that that decision dictates the outcome here.

CONCLUSION

Weighing all the incidents of the officials' relationship with PIAA, we affirm the Regional Director's finding that PIAA has not met its burden of proving that the officials are independent contractors rather than employees. In particular, we find that the officials' employee status is well substantiated by the extent of PIAA's control over the officials, the integral nature of the officials' work to PIAA's regular business, PIAA's supervision of the officials, the method of payment, and the fact that the officials do not render their services as part of an independent business. We also find that the connection between the officials' skills and PIAA's essential functions, as well as PIAA's role in developing those skills, further supports a finding of employee status. But even if that factor were inconclusive, we still would find that the overall weight of the factors favoring employee status

[24] For example, ECBA's agreement with CBOA appeared to constrain its ability to cancel assignments or terminate officials. 282 NLRB at 344. Moreover, because of CBOA's role in pre-screening officials, ECBA, "unlike the usual employer," did not "employ inexperienced individuals or unilaterally undertake a training program of its own." Id. at 343.

[25] In agreeing with the judge that the officials were independent contractors, however, the *Big East* Board found "it unnecessary to rely on his finding that the officials' capacity to affect their working conditions by negotiating through an agent, the CBOA, supports the inference that they are independent contractors." Id. at 335 fn. 1. Of course, since statutory employees may also affect their working conditions by negotiating via an "agent," (e.g., a labor organization) that fact alone does not support a finding of independent-contractor status. CBOA, though, engaged in functions beyond negotiating as an agent. As described, CBOA played a major role in determining whether officials were eligible to work games and in evaluating officials' performance, thereby assuming responsibilities that are typically the sole purview of the employer. It was through this quasi-employer role—which has no parallel for PIAA officials—that CBOA limited ECBA's control over the officials' work. This distinctive role is also reflected in the "general agreement" between the CBOA and the ECBA, which, according to the judge, did not appear to be a traditional collective-bargaining agreement. Id. at 343. By circumscribing aspects of the judge's analysis, the Board was, in our view, merely trying to reinforce the general observation that employees' ability to influence their terms and conditions of employment through collective bargaining does not lessen the extent of control an employer has over putative employees.

[26] Notably, on review of *Big East*, the Third Circuit described the judge's finding of entrepreneurship as "unavailing," in that the officials had no guarantee of receiving many assignments and thus had no real ability to increase their income, and that leaving dates "open" for ECBA closed those dates for other potential business opportunities. 836 F.2d at 149.

exceeds that of the factors suggesting an independent contractor relationship. Accordingly, we find that PIAA has not carried its burden of establishing that the officials are independent contractors; instead, they are employees.

ORDER

This proceeding is remanded to the Regional Director for appropriate action consistent with this Decision and Order.

Dated, Washington, D.C. July 11, 2017

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MISCIMARRA, dissenting.

Pennsylvania Interscholastic Athletic Association (PIAA) was created in 1913 to serve as the governing body for interscholastic sports in the Commonwealth of Pennsylvania. Among other things, the PIAA provides a pool of "registered sports officials" to serve as referees for the various sports it governs. The petition at issue in this case seeks a unit of lacrosse referees who officiate at games in two PIAA districts in Western Pennsylvania. That petition raises two issues: (1) whether the Board has jurisdiction over the PIAA, and (2) whether the lacrosse officials are independent contractors rather than employees under Section 2(3) of the Act.

The Regional Director found that the Board has jurisdiction over the PIAA and that the lacrosse officials are statutory employees and not independent contractors. A Board majority, over my dissent, denied review of the jurisdictional issue; and now, the Board majority affirms the Regional Director's determination that the lacrosse officials are employees and not independent contractors.

For the reasons explained below, I remain convinced that the Board should grant review regarding the potential lack of jurisdiction here because this case gives rise to substantial questions about whether the PIAA is a "political subdivision" of the Commonwealth of Pennsylvania and, alternatively, whether the Board should decline jurisdiction over state interscholastic sports governing bodies as a class pursuant to Section 14(c)(1) of the Act. Also, I believe that the petition should be dismissed in any event because the PIAA lacrosse officials are independent contractors rather than employees.

A. The PIAA's Potential Status as a "Political Subdivision" Over Which the NLRB Lacks Jurisdiction

Section 2(2) of the National Labor Relations Act (NLRA or Act) defines the term *employer* as "any person acting as an agent of an employer, directly or indirectly, but [the term] shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof." In *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600, 604 (1971), the Supreme Court held that entities are "political subdivisions" of a state if they are "either (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate."

The PIAA was created in 1913 by a group of high school principals, but today it is governed by the Interscholastic Athletics Accountability Act, also known as Act 91, a comprehensive state law that regulates its operations. The composition of its 31-member Board of Directors is determined by its Constitution. One member of the Board is appointed by the Commonwealth of Pennsylvania's Secretary of Education, while the remaining members represent various interest groups related to interscholastic sports. The vast majority of the PIAA's 1600 member schools, and the membership of the various groups that appoint members to its Board, are public schools.

All 50 states have governing bodies similar to the PIAA that closely control and ensure the quality, fairness and competitiveness of high school sports in their state.[1] About 90 percent of the nation's K-12 students attend public schools.[2] It follows that state high school sports associations are dominated by public high schools. Courts have consistently held that state high school sports associations are "state actors," i.e., entities exercising state government authority and power. See, e.g., *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001) (holding that high school sports association is state actor based in part on its domination by public schools represented by "their officials acting in their official capacity to provide an integral element of secondary public schooling"); *Moreland v. Western Penn. Interscholastic Athletic League*, 572 F.2d 121, 125 (3d Cir. 1978) (holding that the PIAA is state actor).

[1] http://www.nfhs.org/resources/state association-listing (last visited 2/14/2017).

[2] Council for American Private Education, http://www.capenet.org/facts.html (last visited 2/14/2017).

I believe that these facts raise a substantial issue warranting review regarding whether the PIAA is exempt from the Board's jurisdiction as a political subdivision of the Commonwealth of Pennsylvania, and whether the Board should, in any event, decline jurisdiction over state interscholastic sports governing bodies as a class pursuant to Section 14(c)(1) of the Act. See *Hyde Leadership Charter School–Brooklyn*, 364 NLRB No. 88, slip op. at 9–16 (2016) (Member Miscimarra, dissenting); *The Pennsylvania Virtual Charter School*, 364 NLRB No. 87, slip op. at 11–18 (2016) (Member Miscimarra, dissenting).

In addition, I believe that the relationship between the PIAA lacrosse officials and the public high schools whose games they officiate also raises an issue warranting review with respect to the Board's jurisdiction. See *Airway Cleaners, LLC*, 363 NLRB No. 166, slip op. at 2–3 (2016) (Member Miscimarra, concurring) (explaining that putative employer's joint-employer status with exempt entity raises issue regarding Board's jurisdiction); *Northwestern University*, 362 NLRB No. 167 (2015) (Board declined to exercise jurisdiction over football players at private university where rest of conference and large majority of other Division I schools were public universities outside the Board's jurisdiction). Under either the broad joint-employer test adopted by a Board majority in *BFI Newby Island Recyclery (Browning-Ferris Industries)*, 362 NLRB No. 186 (2015) (*Browning-Ferris*),[3] or under the narrower test applied in pre–*Browning-Ferris* joint-employer precedent, there is substantial reason to believe that if the PIAA is an employer of the lacrosse officials at issue here, the public high schools whose games they officiate, whose coaches evaluate them, and who pay them are joint employers. Moreover, because this issue is jurisdictional, I believe that it is properly before the Board regardless of whether it was raised before the Regional Director.

B. The Pittsburgh Area High School Lacrosse Officials Are Independent Contractors.

The Section 2(3) definition of the term *employee* expressly excludes "independent contractors." The Supreme Court long ago established that the "independent contractor vs. employee" determination must be based on the common law of agency. *NLRB v. United Insurance Co.*, 390 U.S. 254, 256 (1968). No one common-law factor by itself is determinative. Id. The following nonexclusive list of factors governs this determination:

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business.

Restatement (Second) of Agency § 220(2) (1958); see *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 322–326 (1992).

In *FedEx Home Delivery*, 361 NLRB No. 55 (2014), enf. denied 849 F.3d 1123 (D.C. Cir. Mar. 3, 2017), petition for rehearing en banc denied No. 14-1196 (June 23, 2017), the Board reiterated that all 10 factors must be considered and that they should be assessed along with consideration of whether the relationship offers "significant opportunity for entrepreneurial gain or loss." Id., slip op. at 3. However, former Member Johnson criticized the Board majority's independent contractor analysis in *FedEx Home Delivery*—which resulted in a finding that the petitioned-for individuals there were employees, not independent contractors—based on former Member Johnson's view that the majority had wrongly "diminished the significance of entrepreneurial opportunity and selectively overemphasize[d] the significance of 'right to control' factors relevant to perceived economic dependency." Id., slip op. at 20; see generally id., slip op. at 20–33 (Member Johnson, dissenting). On appeal, the Court of Appeals for the D.C. Circuit refused to defer to the Board majority's finding of employee status, based on the court's view that the majority had impermissibly refused to follow the court's materially indistinguishable decision in *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009) (*FedEx I*). See 849 F.3d at 1127–1128. I have previously expressed my agreement with former Member Johnson's criticisms of the expanded employee definition applied in *FedEx Home Delivery*.[4] In the instant case, when the common law factors are properly applied, I believe that the record supports a finding that

[3] Former Member Johnson and I dissented from the Board majority's expanded definition of joint-employer status in *Browning-Ferris*. See 362 NLRB No. 186, slip op. at 21–50 (Members Miscimarra and Johnson, dissenting).

[4] See *Browning-Ferris*, 362 NLRB No. 186, slip op. at 26 fn. 24 (Members Miscimarra and Johnson, dissenting).

the lacrosse officials are independent contractors, not employees.

1. *Extent of Control.* Lacrosse officials exercise broad judgment and independent discretion when officiating a game. This critical point is obvious to anyone who has ever watched an athletic contest. Whether to count a scoring play (in lacrosse, a goal) or to call a rule violation, and what penalty or sanction to impose, are entirely within an official's unreviewable discretion. The PIAA has no control over these matters, and such lack of detailed control is compelling support for finding the officials to be independent contractors. See, e.g., *Porter Drywall, Inc.*, 362 NLRB No. 6, slip op. at 3 (2015) (finding that control factor, especially discretion in how to complete work, supports independent contractor status); *Pennsylvania Academy of the Fine Arts*, 343 NLRB 846, 847 (2004) (finding models to be independent contractors given their discretion in how to achieve results).

Regular season games are scheduled by the participating schools, not the PIAA, which has no control over when the game starts, where it is played, or how long it lasts. The PIAA does not assign lacrosse officials to referee particular regular season games; instead, one of the participating schools (usually the "home" team) makes its schedule available to the officials either directly or through an "assignor." Officials are entirely free to accept or reject game assignments. See, e.g., *Crew One Productions, Inc. v. NLRB*, 811 F.3d 1305 (11th Cir. 2016), denying enf. to 361 NLRB No. 8 (2015) (freedom to accept or reject work assignments is a telling characteristic of independent contractors); *Pennsylvania Academy of the Fine Arts*, 343 NLRB at 847 (same).[5]

My colleagues find that this factor supports employee status, and they emphasize that the PIAA directs the lacrosse officials to enforce the rules of lacrosse, to wear official uniforms, and to use good "officiating mechanics" on the field. With all due respect to my colleagues, I believe this finding defies common sense for a simple reason: in every team sport—regardless of whether officials are independent contractors or employees, and if the latter, regardless of who is the employer—there must be a common understanding of the rules of the game. Therefore, when two teams play a game of lacrosse, everybody expects the officials to apply the rules of lacrosse, and likewise, it is hardly indicative of employee versus independent contractor status that the officials would wear uniforms and use standard "officiating mechanics." These things are required by the very nature of competitive team sports.[6] Therefore, these considerations beg the question of whether the officials are independent contractors or employees. Moreover, to the extent it is relevant that the high school lacrosse officials are required to apply the rules of lacrosse and use proper techniques, it is significant that these rules and techniques are not devised by the PIAA. Rather, the rules governing high school lacrosse, standard officiating techniques and periodic rules interpretations instead are promulgated by the National Federation of State High School Associations ("Federation").[7] My colleagues' suggestion that the PIAA creates its own rules, issues its own rules updates and develops its own officiating mechanics paints a distorted picture of PIAA control where, in fact, there is almost none. In short, I believe it defies reason and logic to find that the lacrosse officials here are employees rather than independent contractors because they are expected by everyone—not merely the PIAA—to act like officials, to be recognizable as officials (by wearing the uniform of an official), and to adhere to the established rules governing high school lacrosse.

The majority also reasons that the PIAA has the authority to discipline a lacrosse official for various infractions. However, there is no evidence that the PIAA has ever *exercised* any right to impose discipline. In other contexts when the Board evaluates the appropriateness of asserting jurisdiction (e.g., when evaluating alleged supervisory or managerial status), the Board has required evidence that control or authority has been exercised.[8]

[5] The court of appeals denied enforcement of the Board majority's finding in *Crew One* that the disputed stagehands were employees of the company that referred them to jobs. I relevantly dissented in *Crew One*, and I agree with the court's assessment of the case and its conclusion that the stagehands were independent contractors.

[6] See, e.g., *Harvey v. Ouachita Parish School Board*, 545 So.2d 1241, 1243 (La. Ct. App. 1989) (rejecting claim that high school sports officials were employees and stating, "In order to have competition, there must be some structure or framework within which to conduct that competition.").

[7] The Federation submitted an amicus brief explaining its rules promulgation role. See also *Lynch v. Workmen's Comp. Appeal Bd.*, 554 A.2d 159, 161 (Pa. Commw. Ct. 1989) (finding that the Federation, not the PIAA, issued high school athletic rules and officials' manuals), appeal denied 578 A.2d 416 (Pa. 1990); *Gale v. Greater Washington Softball Umpire's Association*, 19 Md. App. 481, 311 A.2d 817 (1973) (rules issued by Amateur Softball Association do not evidence control of umpires association).

[8] See, e.g., *Pacific Lutheran University*, 361 NLRB No. 157, slip op. at 24 (2014) ("In order for decisions in a particular policy area to be attributed to the faculty, the party asserting managerial status must demonstrate that faculty actually exercise control or make effective recommendations."); *Lucky Cab Co.*, 360 NLRB 271, 273 (2014) ("We reject, therefore, the judge's reliance on 'paper authority' set forth in the handbook, in light of the contrary evidence of the road supervisors' actual practice.").

In *Browning-Ferris*, 362 NLRB No. 186, slip op. at 14, the Board majority abandoned its reliance on the actual exercise of authority when evaluating joint-employer status, and the majority held that joint-employer status can result merely from "reserved authority" where the potential control is "indirect." I disagree with this departure from well-

Indeed, in *FedEx Home Delivery* itself, the Board majority indicated that it would consider only actual, as opposed to potential, entrepreneurial opportunity as probative of independent contractor status. 361 NLRB No. 165, slip op. at 10 ("The Board has been careful to distinguish between actual opportunities, which allow for the exercise of genuine entrepreneurial autonomy, and those that are circumscribed or effectively blocked by the employer."). If the Board will not attach significance to potential authority when it fails to support employee status, then the Board may not validly rely on such potential authority here.

My colleagues argue that their double standard is justified by "the Act's preference for the inclusion of workers as employees under the Act's protection" and the Board's "experience." This ignores the Supreme Court's explicit rejection of such a policy-driven approach and its requirement, instead, that the Board adhere to common law agency principles in applying the Section 2(3) definition of "employee." See *United Insurance*, supra, 390 U.S. at 256. The Court further noted that this common law agency analysis did *not* involve any "special administrative expertise" by the Board. See id. at 260. Where, as here, the Board goes beyond the boundaries of those common law principles, it exceeds its jurisdiction and exercises power outside of "channels intended by Congress." *FedEx I*, supra, 563 F.3d at 496 (internal quotation omitted). As Judge Friendly aptly observed in *Lorenz Schneider Co. v. NLRB*, 517 F.2d 445, 445 fn. 1 (2d Cir. 1975):

> The legislative history of the Taft-Hartley Act reveals a clear desire on the part of Congress to restrain the tendency of courts, as evidenced in the *Hearst Publications* decision, to bow to the supposed expertness of the Board in its assessment whether a particular group should be considered employees for purposes of s 2(3) of the National Labor Relations Act. By its amendment to s 2(3) Congress indicated that the question whether or not a person is an employee is always a question of law, since the term is not meant to embrace persons outside that category under the general principles of the law of agency.

(Internal quotations and citations omitted.)

In any event, if lacrosse officials exhibit bias, incompetence or unfairness in their officiating, the possibility that the PIAA might be required to take some type of action does not mean the officials are employees as opposed to independent contractors. Like the existence of the rules themselves, these standards are required by the very nature of competitive team sports. If the officials commit recurring mistakes or misdeeds, they would face adverse consequences regardless of whether they are employees or independent contractors. Focusing specifically on extent of control, abundant case law indicates that officials are extremely independent and have broad and unreviewable discretion, which strongly support finding independent contractor status. Sushnet, *Are Amateur Sports Officials Employees?*, 12 Sports Law J. 123, 136–141 (Spring 2005) (discussing cases and citing Donald C. Collins, National Assn. of Sports Officials, Special Report: Officials & Independent Contractor Status (1999)). See *Lynch v. Workmen's Comp. Appeal Bd.*, supra, 554 A.2d at 159 fn. 2, 161–163 (holding that PIAA high school football official was independent contractor, citing, among several factors, his discretion over in-game officiating decisions); *Gale v. Greater Washington Softball Umpire's Association*, supra, 311 A.2d at 821–822 (softball umpire was independent contractor where umpire's association had no control over the way he officiated a given game).[9]

established Board and court case law for the reasons expressed in the *Browning-Ferris* dissent. Id., slip op. at 25–32, 35–43 (Members Miscimarra and Johnson, dissenting).

Additionally, neither *Friendly Cab Co.*, 341 NLRB 722, 724 (2004), enfd. 512 F.3d 1090 (9th Cir. 2008), nor *NLRB v. Associated Diamond Cabs*, 702 F.2d 912, 920 (11th Cir. 1983), cited by the majority, supports their position. The former relied on instances of actual discipline as support for finding taxi drivers to be employees, while the latter held (contrary to the Board) that the disputed taxi drivers were independent contractors. In so ruling, the court noted that an unenforced right to control the cleanliness of cabs showed only a "minor degree" of control, and it emphasized that, as in this case, there was no evidence that the putative employer had disciplined drivers. 702 F.2d at 921–922, 924.

[9] Likewise, applying common law agency criteria, the United States District Court for the Western District of Pennsylvania held that no rational trier of fact could find that a high school basketball official was a PIAA regular-season employee. *Kemether v. Pennsylvania Interscholastic Athletic Association, Inc.*, 15 F. Supp. 2d 740, 757–759 (W.D. Pa. 1998). Additionally, viewing this as a Pennsylvania public labor law matter, the Pennsylvania Labor Relations Board ruled that PIAA high school football officials were independent contractors. *PIAA*, 11 PPER ¶11284, 1980 WL 609341 (1980). That decision, as well, was based on the same common law agency factors applicable to independent contractor vs. employee cases under the Act, and the state administrative tribunal cited our case law.

In addition to the court consensus that amateur sports officials are independent contractors, 11 states have enacted legislation providing that such officials are independent contractors. *Sushnet*, supra, 12 Sports Law J. at 137 & fn. 107.

My colleagues state that they consider, but do not give controlling weight to, "rulings by other governmental bodies." In fact, the majority effectively gives no weight at all to the many federal court and state court decisions, legislative enactments and administrative rulings declaring that amateur sports officials are independent contractors. My colleagues suggest that different standards may have applied in those cases. But they offer not a single example where that was so, and virtually all courts and administrative tribunals adhere to the Second Re-

2. *Distinct Occupation or Business.* I agree with my colleagues that the work of the lacrosse officials is an essential part of the PIAA's normal operations, a fact that supports employee status. On the other hand, the PIAA places no restriction on the ability of lacrosse officials to officiate games for entities other than the PIAA. On balance, I believe that this factor is inconclusive.

3. *Supervision.* The shutter-click exercise of independent judgment that is inherent in sports officiating is especially applicable to lacrosse. This is an unusually fast-paced sport that requires officials to make countless snap decisions during games, based solely on their familiarity with the rules and their personal judgments.[10] Further, lacrosse is a contact sport, and how an official calls a game can have serious physical consequences for the players. It is all the more telling, then, that the PIAA does not closely, or even loosely, supervise high school lacrosse officials. The record reflects that the PIAA supervisors *never* watch or otherwise monitor the officials' work in regular season games, and officials' calls cannot be directly appealed. Thus, contrary to my colleagues' assertion, the PIAA does not review either specific in-game calls or the officials' "body of work as a whole." The coaches of the competing teams, not the PIAA, submit the only evaluations of officials' regular season work.[11] Accordingly, this factor strongly favors independent contractor status.

When evaluating whether the lacrosse officials are independent contractors rather than employees, my colleagues discount the near-total absence of oversight and supervision on the basis that the lack of direct supervision "reflects the nature of officiating, rather than suggesting independent contractor status." I disagree with my colleagues' analysis of this factor for two reasons. First, in my view, it is unreasonable to *disregard* the nature of officiating when minimizing the significance of control, and then to *invoke* the nature of officiating to explain away the lack of supervision (which, as noted above, strongly undermines any finding of employee status here).[12] Second, I believe my colleagues are incorrect as a matter of law: the lack of oversight and supervision, even in the context of officiating, has been relied upon as a significant consideration that favors independent contractor status. See *Big East Conference*, 282 NLRB 335, 344 (1986) (basketball officials were independent contractors based in part on limited supervision exercised by putative employer), enfd. sub nom. *Collegiate Basketball Officials Assn., Inc. v. NLRB*, 836 F.2d 143 (3d Cir. 1987).[13]

The majority and the Regional Director stress repeatedly that the PIAA assigns officials to playoff games. But these playoff games represent an extremely small portion of any official's work, and a given lacrosse official may work (at most) two or three post-season games.[14] Cf. *Porter Drywall*, supra, slip op. at 5 (employer's direct payment to crew members on small percentage of jobs covered by Davis-Bacon Act would not mandate a different result).

4. *Skill Required.* It cannot be seriously disputed that lacrosse officiating requires considerable skill. This officiating does not involve rote tasks that can be mechanically performed according to detailed directions. Thorough knowledge of the rules, familiarity with the standard signals, practice and experience can improve an offi-

statement § 220 common law agency test in deciding independent contractor versus employee status. Also, as support for finding the officials here to be PIAA employees, the majority relies on a 1957 IRS letter ruling about college sports officials. As my colleagues concede, however, the IRS issued a subsequent (1967) letter ruling in which it found that amateur sports officials *were* independent contractors. Rev. Rul. 67-119, 1967-1 C.B. 284. In any event, the Board declined to rely on an IRS letter ruling in *Lorenz Schneider Co.*, 209 NLRB 190, 191 fn. 5 (1974), enf. denied 517 F.2d 445 (2d Cir. 1975), a case cited by the majority, because the IRS's determination was not based on a full record. Of course, there were such complete records in the many federal and state court cases that have found amateur sports officials to be independent contractors.

[10] Lacrosse is widely known as the "Fastest Game on Two Feet." https://www.usalacrosse.org (last visited Feb. 14, 2017).

[11] While the PIAA has established an evaluation system for officials' post-season work, this process does not evidence employee status because it is specifically mandated by state law. See Pennsylvania Interscholastic Athletics Accountability Act, P.L. 672, No. 91, § 1604-A(7) (The PIAA shall "[a]dopt an evaluation system for game officials at district, interdistrict and championship competitions and utilize that evaluation system in the selection of individuals to officiate those contests."). See *NLRB v. Associated Diamond Cabs*, supra, 702 F.2d at 922 ("[E]mployer imposed regulations that incorporate governmental regulations do not evidence an employee-employer relationship . . . .").

[12] As noted above, the existence of detailed rules of play and the requirement that lacrosse officials enforce those rules also "reflects the nature of officiating," yet my colleagues cite those requirements as evidence of employee status. There is no valid basis for deeming aspects of the PIAA–lacrosse official relationship that are inherent in the nature of sports officiating relevant only if they support employee status.

[13] My colleagues' unsupported finding also ignores the contemporary practice of instant replay review of game officials' calls by the National Football League and Major League Baseball. See http://operations.nfl.com/the-game/history-of-instant-replay/ (describing practice of supervisory personnel reviewing calls by video) (last visited Feb. 27, 2017); http://m.mlb.com/official_rules/replay_review (describing video review practice of Major League Baseball) (last visited Feb. 27, 2017).

[14] https://www.piaa.org/assets/web/documents/2016 Boys Lacrosse Bracket (last visited Feb. 14, 2017). The Pennsylvania high school lacrosse playoffs start with just 16 teams from around the state, which compete in four rounds involving a total of 15 post-season games. If one assumes that the best officials work games in all four rounds, this means 11 playoff games for assignment to the rest of the state's officials.

cial's performance—but in the end, mental quickness and judgment separate good officials from their more pedestrian counterparts. Where skill is an essential element—which appears clearly to be the case here—the Board has found workers to be independent contractors. See, e.g., *Porter Drywall*, supra, slip op. at 4 (performance of skilled work supported finding that drywall crew leaders were independent contractors); *Pennsylvania Academy of the Fine Arts*, 343 NLRB at 847 (emphasizing "high level of skill" in finding models to be independent contractors).[15]

The majority discounts this factor by stating that "many types of employees covered by the Act are highly skilled . . . ." It remains undeniable, however, that "the skill required in the particular occupation" is part of the common law test for employee status. Indeed, my colleagues attach considerable weight to the *absence* of any skill requirement in determining that particular individuals are *not* independent contractors. See, e.g., *Sisters' Camelot*, supra. I believe that the Board is without authority to refuse to give weight to the *presence* of a skill requirement simply because doing so will lead to a finding that disputed individuals *are* independent contractors in a particular case. See *Lancaster Symphony Orchestra*, supra, 822 F.3d at 568 (high degree of skill suggests independent contractor status); *FedEx Home Delivery v. NLRB*, supra, 849 F.3d at 1127–1128 (courts owe no deference to NLRB determinations that particular individuals are employees and not independent contractors).

5. *Who Supplies the Instrumentalities, Tools, and Place of Work.* Lacrosse officials provide, at their own expense, uniforms, caps, game shoes, whistles, penalty flags, note cards for recording scores and penalties, and watches and clocks used to time games. The PIAA's contribution to officials' tools and equipment is confined to giving them small pocket books of the Federation-promulgated rules and cloth PIAA patches for their uniform sleeves. As noted above, the home team provides the playing field, stands and scoreboard for regular season games, while the PIAA undertakes this task solely for the limited number of playoff games held each year. This factor thus points firmly in the direction of independent contractor status. See, e.g., *FedEx Home Delivery*, supra, slip op. at 13 (evidence that workers supply their own equipment supports independent contractor finding); *Argix Direct, Inc.*, 343 NLRB 1017, 1020 (2004) (finding drivers to be independent contractors where they supplied their own trucks).

In finding otherwise, my colleagues rely on the fact that the PIAA's rules require that lacrosse officials work games "at specified places and times." What they mean by this is that, once an official agrees to work a game, he or she must do so at the time and place where the game is scheduled to be played. Here again, as with other indicia discussed above, this requirement is inherent in the nature of officiating competitive team sports. To state the obvious, an official can only referee a game if the official is physically present at the same time and place as the players who are playing the game. The requirement of physical presence at the same place and time as everyone else involved in a game applies to all officiating in team sports, regardless of whether the officials are independent contractors or employees. There is no valid basis for finding that this requirement demonstrates employee status. See also *Crew One Productions*, 811 F.3d at 1311 (fact that stagehands are paid hourly and required to report at specific time and check in and out did not indicate employee status).

6. *Length of Time.* As noted above, lacrosse officials receive single-game assignments, with no expectation that they will receive additional assignments over the course of a year. The defined, short-term nature of these assignments supports a finding that the officials are independent contractors. Compare *Pennsylvania Academy of the Fine Arts*, 343 NLRB at 847 (models' contracts with Academy were limited to single semester; models found to be independent contractors), with *A. S. Abell Publishing Co.*, 270 NLRB 1200, 1202 (1984) ("open-ended duration" of workers' relationship with employer weighs in favor of employee status).

My colleagues nevertheless find this factor inconclusive because, in their view, the lacrosse officials have "an expectation of continued employment with PIAA" as long as they pay their annual dues, meet the PIAA's performance standards, complete testing requirements, and attend required meetings. I disagree for two reasons. First, the prospect that an official could continue receiving assignments if he or she satisfies these many contingencies cannot reasonably be compared to the "open-ended" duration of a typical employment relationship. Second, an official is not assured of receiving even one additional assignment, or any further compensation, even if he or she does satisfy all these requirements. Instead, the record shows that "continued employment" is contingent on the official's selection for a game by a member school or, for the relatively few post-season games

[15] Citing *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 3 (2015), the majority contends that the lacrosse officials' undisputed possession of unique skills is undermined by the fact that they receive ongoing PIAA training. In that case, however, the putative independent contractors were canvassers who solicited donations door to door, no prior experience or specialized skill was required, and the training provided was "minimal." No facts of this character are present here, and there is no evidence that the PIAA uses its own materials (rather than the Federation's) in training officials.

played each year, by the PIAA. There is no valid basis for finding an expectation of continued employment on these facts.[16]

7. *Method of Payment.* Lacrosse officials are paid on a per-game basis, regardless of how long each game lasts. My colleagues correctly note that this tends to support independent contractor status. See, e.g., *Pennsylvania Academy of the Fine Arts*, 343 NLRB at 847 (flat, per-assignment fee supports independent contractor status); *Young & Rubicam International*, 226 NLRB 1271, 1274 (1976) (fixed, per-assignment payment supports independent contractor status). The fact that the PIAA does not withhold deductions from officials' pay also supports independent contractor status. *Crew One Productions, Inc.*, 811 F.3d at 1312; *Argix Direct, Inc.*, 343 NLRB at 1021 (absence of any deductions for taxes or benefits and responsibility for expenses evidences independent contractor relationship); *American Guild of Musical Artists*, 157 NLRB 735, 736 fn. 1 (1966) (focusing on lack of tax withholding in finding musicians to be independent contractors); *NLRB v. Associated Diamond Cabs*, supra, 702 F.2d at 924 fn. 3 (absence of tax withholdings reflects independent contractor status). Finally, the fact that lacrosse officials are paid for regular season games by the home team's school, not the PIAA, and that their fee is negotiated directly by the official and the school (without the PIAA's participation) cuts against a finding that the officials are employed by the PIAA, as does the fact that officials are responsible for all travel expenses.[17]

The majority nevertheless finds that this factor favors employee status because the PIAA determines the fee for post-season games and, in the majority's view, "directly controls the process" by which schools pay officials by prohibiting schools or officials from establishing minimum or maximum fees. My colleagues contend that this prohibition significantly reduces the officials' ability to negotiate their compensation and is inconsistent with any claim that they are truly independent business people. To the contrary, both schools and officials, individually, can negotiate fees, and the record reflects that they have done so. Moreover, the PIAA enhances the ability of lacrosse officials to negotiate fees by prohibiting schools from colluding to set maximum fees.

Nor is there any merit to the view that prohibiting officials from colluding to set minimum fees is inconsistent with independent contractor status. Any effort by independent contractors to collectively set minimum rates would be a per se violation of the antitrust laws. *H.A. Artists & Associates, Inc. v. Actors' Equity Association*, 451 U.S. 704, 717 fn. 20 (1981) (labor antitrust exemption inapplicable to "independent contractor or entrepreneur"); *Meyer v. Kalanick*, 174 F. Supp. 3d 817 (S.D.N.Y 2016) (allegations that Uber platform established agreement among Uber drivers to set fares stated claim for violation of Sherman Act where drivers were alleged to be independent contractors). Accordingly, the prohibition on officials collectively setting minimum fees is not only consistent with independent contractor status but does no more than what the antitrust laws require.[18]

8. *Regular Business of the Employer, Principal in the Business, and Parties' Mutual Understanding.* As noted above, the services provided by the lacrosse officials are, along with many other important functions, an integral part of the PIAA's operations, a fact that supports employee status. On the other hand, the parties plainly understand the lacrosse officials to be independent contractors. The PIAA standard game contract expressly states that the contracting home team (which, it must be remembered, is usually a public high school) and the official are entering into an independent contractor relation-

[16] *Lancaster Symphony Orchestra*, 357 NLRB 1761, 1766 (2011), enfd. 822 F.3d 563 (D.C. Cir. 2016), cited by my colleagues for this point, provides no support for their position. There, musicians were hired to work for the orchestra for specific programs for a 1-year term, which favored independent contractor status. The Board majority found that this was counterbalanced by evidence that many of them returned year after year and worked for the orchestra for long periods of time. Significantly, however, the musicians at issue in that case were offered employment in subsequent years solely on the basis of their having played for the orchestra in prior years. Id. at 1761. As noted above, PIAA lacrosse officials must satisfy numerous requirements before receiving such offers.

[17] Based on almost identical facts, a state court found that "[i]t is clear, at least in regular season games, that the schools themselves conduct the games and hire the officials. Thus, the officials are not the agents or servants of the [state high school sports association]." *Harvey v. Ouachita Parish School Board*, 545 So. 2d at 1243. See also *Wadler v. Eastern Collegiate Athletic Conference*, 2003 WL 21961119 (S.D.N.Y. 2003) (unreported federal district court decision holding that college baseball umpire was not employee of conference because he was paid by member schools for which he umpired).

[18] My colleagues dismiss the significance of applicable antitrust requirements on the grounds that the PIAA was not shown to have been motivated by those concerns when it adopted its anti-collusion rules. In this respect, however, I believe my colleagues improperly import a "motivation" analysis into the common law of agency. The point remains that the PIAA's rules do not demonstrate that it controls how officials are paid when those rules impose no limits beyond what the law requires. Again, "employer imposed regulations that incorporate governmental regulations do not evidence an employee-employer relationship . . . ." *NLRB v. Associated Diamond Cabs*, supra, 702 F.2d at 922.

The PIAA does pay officials for playoff games and determines the amount it will pay. But, as noted above, the playoffs represent a small number of games and, even with respect to those games, officials are still paid on a per-game basis, with no withholding of deductions, and they are still responsible for their travel expenses. In these circumstances, the PIAA's payments to a few officials for two or three playoff games do not meaningfully support employee status.

ship. As noted above, the payment, withholding, benefit, and expense arrangements are exactly what one would expect for an independent contractor. Moreover, as also discussed above, a Pennsylvania state court, a federal court in a PIAA case, and other state courts have routinely ruled that high school sports officials are independent contractors. Nothing in this record or in the body of relevant law would lead a high school lacrosse official to believe that she or he was anything other than an independent contractor. See *Crew One Productions, Inc.*, 811 F.3d at 1312 (independent contractor agreements evidence of intent to form independent contractor relationship).

9. *Independent Business.* PIAA lacrosse officials may only work as lacrosse officials at PIAA games in one PIAA district at a time, but they are free to officiate at non-PIAA games wherever they wish and to referee PIAA games in any other sport in any PIAA district. Moreover, the lacrosse officials can and do hold other forms of outside employment. Those jobs are their primary employment. Indeed, this is an obvious necessity, since the regular season is only about 14 games long and officials generally receive around $70 per game. In this regard, the record shows that at least one lacrosse official was a lawyer and another was an NLRB field examiner.

These facts all support a finding of independent contractor status, yet my colleagues nevertheless find that this factor favors a finding that lacrosse officials are employees. Here, the majority points to the fact that the lacrosse officials do not render services as part of their own enterprise and cannot hire others to perform their tasks, as well as to the lack of evidence of "actual (as opposed to theoretical) opportunity for gain." Here as well, I believe my colleagues' findings disregard the nature of officiating a team sport. Referees must be qualified and impartial. Officials provided by the PIAA meet these essential requirements because the PIAA certifies officials' qualifications under its status as the governing body for interscholastic sports in Pennsylvania, and because its governance structure makes it independent of any particular school or individual. *Lynch v. Workman's Comp. Appeal Bd.*, 554 A.2d at 162 ("[T]he very essence of the officials' position during a game requires that the officials be free from control by the District, the home team, or its opponent."). Persons purporting to offer officiating services as part of their own enterprise, or persons hired by a PIAA official to officiate in his or her place, cannot provide those same assurances. See also *Collegiate Basketball Officials Assn., Inc. v. NLRB*, 836 F.2d 143, 147 (3d Cir. 1987) ("That officials may not choose their own substitutes—usually indicative of employee status—here argues the uniqueness of the official's skill. Simply, the officials are not fungible.").

It is certainly true, as the majority observes, that lacrosse officiating lasts for the duration of the game, and officials cannot control the length of the game by working more quickly or efficiently. However, it strains credulity to suggest that the fixed duration of a lacrosse game means that the officials are employees rather than independent contractors.[19] When the relevant evidence is considered properly and as a whole, I believe that the factor of entrepreneurial opportunity supports a finding that the lacrosse officials are independent contractors. See, e.g., *Pennsylvania Academy of the Fine Arts*, 343 NLRB at 847 (relying on part-time nature of work and other earning opportunities in finding artistic models to be independent contractors); *DIC Animation City*, 295 NLRB 989, 991 (1989) (finding writers to be independent contractors in absence of "practical exclusivity" between writers and purported employer).

10. *Controlling Precedent.* In *Big East Conference*, 282 NLRB at 335, the Board found college basketball officials to be independent contractors rather than employees of the Eastern College Basketball Association (ECBA). In so finding, the Board adopted an administrative law judge's decision that relied on factors equally present here, including the officials' skill, their ability to accept or refuse assignments, the lack of evidence that officials had been terminated or disciplined for in-season performance, the officials' payment of dues to their association, the fixed per-game nature of officials' compensation, the evidence that officials had other full-time employment, and the officials' ability to increase their earnings by working games for other entities. Indeed, the Board found independent contractor status even though ECBA supervisors attended games, provided pre-game directions on how to handle coaches and game situations, and came into the officials' locker room at halftime to speak to the officials about "missed calls, officials being out of position, or other situations that occurred during the first half," 282 NLRB at 338—facts my colleagues

[19] In *Lancaster Symphony Orchestra*, supra, the Board majority found that orchestra musicians were not independent contractors in part because they could not perform a concert faster and thus increase their opportunity for additional work. 357 NLRB at 1765 fn. 8. Former Member Hayes relevantly dissented, observing in this respect that given the nature of symphony performances, the ability to accept or decline work with the symphony and to accept work elsewhere is the relevant consideration. Id. at 1768. I agree with the views stated in Member Hayes' dissent, which are equally applicable to the lacrosse officials at issue in this case. See also *Lerohl v. Friends of Minnesota Sinfonia*, 322 F.3d 486 (8th Cir. 2003) (same; notion that orchestra musicians are always employees when they perform in a conducted band or orchestra because the conductor controls rehearsal schedule, music choice and how music is played "flies in the face of [ ] common sense").

omit from their discussion of the case. I believe that the Board's holding in *Big East Conference* compels a finding that the lacrosse officials here are independent contractors.[20]

The majority declines to follow *Big East Conference,* even though it is the only Board decision directly on point. They imply that it is dated and limited to its facts. They also assert that the case is distinguishable because the disputed referees were members of the College Basketball Officials Association (CBOA), an officials' association that pre-screened officials, negotiated a fee schedule, and evaluated officials' performance, which affected their eligibility for assignments in future years. None of this withstands scrutiny. The Board cited *Big East Conference* with approval as recently as 2015 in *Porter Drywall*, supra, slip op. at 4 fn. 14. Its validity has not been questioned since. Nor was the role of the officials' association an essential element of the Board's decision in *Big East Conference*. To the contrary, the Board specifically stated there that "[i]n agreeing with the judge that the officials under contract with the ECBA are independent contractors, we find it unnecessary to rely on his finding that the officials' capacity to affect their working conditions by negotiating through an agent, the CBOA, supports the inference that they are independent contractors." 282 NLRB at 335 fn. 1.[21]

CONCLUSION

For the reasons set forth above, I believe the instant case gives rise to substantial questions regarding whether the Board lacks jurisdiction over the PIAA on the basis that it is a "political subdivision" within the meaning of Section 2(2) of the Act, as well as whether the Board, in any event, should decline jurisdiction over state interscholastic sports governing bodies as a class pursuant to NLRA Section 14(c)(1). Additionally, I believe my colleagues incorrectly find that PIAA lacrosse officials are employees when the evidence overwhelmingly indicates that the officials are independent contractors based on their authority to referee games free from any supervision or control, the distinct skills they possess, the fact that they are paid on a per-game basis, and their freedom to take other work. Moreover, finding the lacrosse officials at issue here to be independent contractors is consistent with the vast weight of precedent holding that PIAA officials in other sports, and similar officials in other states, are independent contractors based on similar considerations.

Accordingly, I respectfully dissent.

Dated, Washington, D.C. July 11, 2017

Philip A. Miscimarra, Chairman

NATIONAL LABOR RELATIONS BOARD

[20] The United States Court of Appeals for the Third Circuit enforced the Board's decision. *Collegiate Basketball Officials Assn., Inc. v. NLRB*, 836 F.2d at 143. Although the court observed that "[o]fficiating ill fits the usual distinction between independent contractors and employees," id. at 149, it largely endorsed the Board's application of the common law agency factors to the officials in question. See id. at 148–149. Of particular relevance here, the court noted that officiating was highly skilled work, that the conference itself did not train officials, and that the NCAA, not the conference, drafted the playing rules. See id. at 145–148.

[21] The majority interprets this aspect of the Board's decision in *Big East Conference* as "merely trying to reinforce the general observation that employees' ability to influence their terms and conditions of employment through collective bargaining does not lessen the extent of control an employer has over putative employees." I believe the *Big East* Board meant what it said. In any event, even if the role of the officials' association had been a significant factor in the Board's analysis, the absence of a similar officials' association in this case is more than offset by the detailed supervision exercised by ECBA supervisors over the basketball officials at issue in *Big East Conference*, which has no counterpart in this case. Taken as a whole, *Big East Conference* strongly supports independent contractor status for the lacrosse officials at issue in this case.

CERTIFICATE OF SERVICE

I hereby certify that all Respondents in the proceeding below are being served with the Petition for Review, Corporate Disclosure Statement, and attached Decisions, in the manner specified below, this 2d day February, 2018:

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